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IN THE

Supreme Court of the United States

October Term, 1962

No. 852

TEITELBAUM FURS, INC., a California corporation; TEITELBAUM FURS, INC., a New York corporation; TEITELBAUM FURS OF PALM SPRINGS, INC., a California corporation,

Petitioners,

vs.

AMERICAN HOME INSURANCE COMPANY, a corporation; CALEDONIAN INSURANCE COMPANY, a corporation; CERTAIN UNDERWRITERS AT LLOYD'S LONDON subscribing to Certificate LA 3539/RC 45820; THE DOMINION INSURANCE COMPANY, LTD.; THE LONDON AND EDINBURGH INSURANCE COMPANY, LTD.; ANGLO-SAXON INSURANCE ASSOCIATION, LTD.; THE WORLD'S MARINE AND GENERAL INSURANCE COMPANY, LTD.; THE ROYAL SCOTTISH INSURANCE COMPANY, LTD.; TRENT INSURANCE COMPANY, LTD.; ST. HELENS INSURANCE COMPANY, LTD.; EXCESS INSURANCE COMPANY, LTD.; THE WORLD AUXILIARY INSURANCE COMPANY, LTD.; ENGLISH AND AMERICAN INSURANCE COMPANY, LTD.,

Defendants and Respondents,

TEITELBAUM FURS, INC., a California corporation; TEITELBAUM FURS, INC., a New York corporation; TEITELBAUM FURS OF PALM SPRINGS, INC., a California corporation,

Petitioners and Respondents on the Cross-Appeal.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

PAGE

Petitioners failed to raise any federal question in the court of first instance or properly to raise any federal question in the California District Court of Appeal or Supeme Court.. 1

Comments respecting statement of the case 8

Question presented 19

The California Supreme Court followed established law in holding that Mr. Teitelbaum's conviction was res judicata.... 20

Application of alter ego doctrine and res judicata by United States Supreme Court 23

Conclusion 25

TABLE OF AUTHORITIES CITED

CASES	PAGE
Anderson, In re, 107 Cal. App. 2d 670, 237 P. 2d 720	21
Bernhard v. Bank of America Nat. Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P. 2d 892	19, 20
Bloeth v. State of New York, 7 L. Ed. 2d 780, 82 S. Ct. 661	7
Chicago, Milwaukee & St. Paul Railway Company v. Minneapolis Civic & Commerce Association, 247 U. S. 490, 38 S. Ct. 553, 62 L. Ed. 1229	23, 24
Connecticut Fire Insurance Co. v. Ferrara, 277 F. 2d 388, cert. den. 364 U. S. 903, 5 L. Ed. 193, 81 S. Ct. 231	24, 25
Davis v. Alexander, 269 U. S. 114, 46 S. Ct. 34, 70 L. Ed. 186	24
Davis v. Basalt Rock Co., 114 Cal. App. 2d 390, 250 P. 2d 254	5
Duncan v. State of Missouri, 14 S. Ct. 570, 152 U. S. 377, 38 L. Ed. 485	8
Eagle, etc., Ins. Co. v. Heller, 149 Va. 82, 140 S. E. 314, 57 A. L. R. 490	20
Edelman v. People of the State of California, 73 S. Ct. 293, 344 U. S. 357, 97 L. Ed. 387	4, 5
Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1532, 55 S. Ct. 794	7
Hollander v. Henry, 180 F. 2d 582	24
People v. Teitelbaum, 163 Cal. App. 2d 184, cert. den. 359 U. S. 200	9
Radio Station W. O. W. v. Johnson, 326 U. S. 120, 89 L. Ed. 2092, 50 S. Ct. 1475	7
Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal. 2d 623, 241 P. 2d 985	6

RULES

	PAGE
California Rules on Appeal, Rule 24(a)	3
California Superior Court Rules, Rule 3(5)	18
Supreme Court Rules, Rule 23.1(f)	2

STATUTES

California Code of Civil Procedure, Sec. 659a	18
California Code of Civil Procedure, Sec. 2033	23

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners Failed to Raise Any Federal Question in the Court of First Instance or Properly to Raise Any Federal Question in the California District Court of Appeal or Supreme Court.

At no time from the commencement of plaintiffs' action on January 18, 1957 until *after* the Opinion of the

California Supreme Court became final and its remittitur had issued on November 26, 1962, did plaintiffs-petitioners ever suggest that there was a federal question involved in this case. Supreme Court Rules, Rule 23-1-(f), requires respecting the petition for certiorari in part as follows:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error), and the way in which they were passed upon by the court; * * *."

The record shows that the petitioners did not present any federal question to the court of first instance, nor did the petitioners present any federal question in the regular course of appeal to any California appellate court nor does the record disclose that any California court passed upon any Federal question.

At the time petitioners' action was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, Albert Teitelbaum had been convicted of conspiracy to commit grand theft, attempted grant theft and filing of false and fraudulent insurance claims concerning the same purported thefts and the same insurance claims as those sued upon by petitioners [Rep. Tr. p. 2060, line 8, to p. 2067, line 17], but the conviction was not as yet final. Thereafter, when the conviction became final, the respondent-defendants brought on a motion in the Superior Court to amend

their answer, setting forth the finality of the said conviction, the privity of Albert Teitelbaum with the corporate plaintiffs by reason of the corporations being Teitelbaum's *alter egos*, and urging said conviction as a bar to plaintiffs' action. The amendment was allowed by the Superior Court and was filed December 8, 1958 [Clk. Tr. pp. 34-36].

The plaintiffs-petitioners have failed to include in their transcript, certified to this Court, the motion of the defendants to be permitted to file said amendment, nor have they included the plaintiffs' opposition thereto. It was at that point, in opposing the proposition that Mr. Teitelbaum's conviction should be a bar to collection by the corporations, that any constitutional question which plaintiffs may have felt existed could have been raised. It was not raised at that point. Not only did the plaintiffs fail to urge any federal constitutional question when the defendants first set forth Mr. Teitelbaum's conviction as a bar to his action, but did not mention it at trial and did not mention it in any of the appellate briefs to the California District Court of Appeal or the California Supreme Court (see Tables of Authorities and Indices to said briefs, wherein the Federal Constitution is no where mentioned). To the contrary, the first mention of any claimed federal question is contained in a "Motion to Recall Remittitur", filed by plaintiffs after the judgment of the California Supreme Court had become final.*

---

*California Rules on Appeal, Rule 24(a), provides, in part: "A decision of the Supreme Court becomes final 30 days after filing unless prior to the expiration of said 30 day period either a shorter time, or an additional period of time not to exceed 30 days, is ordered by the court."

Under California procedure a motion to recall a remittitur is not a part of the regular appellate processes but rather is an extremely limited and extraordinary remedy.[1] It is not a part of the limited office of such a motion to raise points which could have been but were not raised at trial or during the regular appellate proceedings. This Honorable Supreme Court had occasion to consider its power to grant certiorari after the presentation of a question on a motion to recall remittitur, in the case of *Edelman v. People of the State of California*, 73 S. Ct. 293, 344 U. S. 357, 97 L. Ed. 387, where it was held that the Supreme Court is without power to decide whether constitutional rights have been violated when federal questions were not seasonably raised in accordance with the requirements of state law. There the Supreme Court stated:

> "Petitioner contends, first, that his conviction violates the Due Process Clause of the Fourteenth Amendment because the vagrancy statute is vague, indefinite and uncertain. The record indicates that this defense was not raised on trial but was presented for the first time as the fifth of petitioner's grounds of appeal, stated as follows: '5. Vagrancy statute is unconstitutional because vague and indefinite'.
>
> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of

[1] The decision of the California Supreme Court was filed Oct. 25, 1962 and thus became final Nov. 24, 1962, since there was no contrary order by the court. Petitioners' Motion to Recall Remittitur was not filed until Dec. 18.

state law. Hulbert v. Chicago, 202 US 275, 50 L ed 1026, 26 S Ct 617 (1906); Mutual Life Ins. Co. v. McGrew, 188 US 291, 308, 47 L ed 480, 484, 23 S Ct 375, 63 LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below." (344 U. S. at pp. 358, 359, 97 L. Ed. at pp. 390, 391).

Further, in the *Edelman* case, the Supreme Court specifically remarked on the California rules respecting a motion to recall remittitur, stating:

> "Further, the motion sought what, under California law, is an extraordinary remedy, not available where the court had jurisdiction to render the judgment complained of and it does not affirmatively appear that it was the result of fraud, imposition or misapprehension of facts." People v. Stone, 93 Cal App 2d 858, 861, 210 P 2d 78, 80 (1949) and cases there cited; 23 Cal L Rev 354." (344 U. S. at p. 361, 97 L. Ed. at p. 392).

The attempt of petitioners to present a constitutional question to the California Supreme Court by their motion to recall the remittitur was evidently done in desperation, in full realization that no constitutional question had ever been raised previously in either the trial court or any California appellate court. Under these circumstances the comment of the California District Court of Appeal in *Davis v. Basalt Rock Co.*, 114 Cal. App. 2d 300, 250 P. 2d 254, 260 (hearing denied), is pertinent:

> "To permit movants to have the remittitur recalled for this reason would be to permit litigants to

present the merits of an appeal piecemeal. That cannot be done. There was ample opportunity to present the issue of survivability squarely. This was not done—not even on petition for rehearing here, nor on petition for hearing in the Supreme Court. Pertinent here is what was said in Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal. App. 2d 1, 3, 204 P. 2d 387, 388:

"'We are impressed that the facts in the instant case bring it within the rule that if a party is dissatisfied with the judgment as rendered in an appellate court, his remedy is to petition for a rehearing or modification of the judgment within the time allowed by law and before the remittitur has issued.'"

The California Supreme Court stated in *Southwestern Inv. Corp. v. City of Los Angeles*, 38 Cal. 2d 623, 241 P. 2d 985, 988:

"But an appellate court has no appellate jurisdiction of its own judgment; and it has no power to recall the remittitur for the purpose of reconsidering or modifying its judgment on the merits.

"The decisions above cited establish that the extraordinary remedy by motion to recall the remittitur may be invoked only in cases of fraud or imposition practiced upon the court or upon the opposite party, or where the judgment was based on a mistake of fact or occurred through inadvertence. None of these is present when the court renders the judgment advisedly upon the case as presented by the parties. Estate of Ross, supra, 189 Cal. 317, 318, 207 P. 1014. * * * A motion to recall the

remittitur is not justified as an opportunity to the parties to relitigate their cause nor to the appellate court to redetermine the merits. * * *."

From the foregoing it is clear that there was an adequate state ground for the refusal of the California Supreme Court to recall its remittitur.

More recently, in the case of *Bloeth v. State of New York*, 7 L. Ed. 2d 780, 781, 82 S. Ct. 661, 662, Mr. Justice Harlan stated, in denying an application for stay of execution:

> "It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion for reargument. In such circumstances it is clear that this Court would be without jurisdiction to consider them. E. G. Herndon v. Georgia, 295 US 441, 443, 79 L. ed 1530, 1532, 55 S Ct 794; Radio Station W O W v. Johnson, 326 US 120, 128, 89 L. ed 2092, 2099, 65 S Ct 1475."

In the last case cited by Justice Harlan, *Radio Station WOW v. Johnson, supra*, the Supreme Court stated:

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition." (89 L. Ed. at p. 2100, 326 U. S. at p. 128).

Likewise, in *Herndon v. Georgia*, 295 U. S. at p. 443, 79 L. Ed. at p. 1532, the court states:

> "The long-established general rule is that the attempt to raise a federal question after judgment,

upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.'

A fortiori, where the petitioner, as in this case, has not even raised the question on motion for rehearing, the attempt to raise it after the California Supreme Court's decision became final comes too late. The denial by the California Supreme Court of the petitioners' motion to recall remittutur "* * * was in no aspect equivalent to a decision against a right under the Constitution of the United States specially set up or claimed at the proper time and in the proper way." *(Duncan v. State of Missouri,* 14 S. Ct. 570, 152 U. S. 377, 383-384, 38 L. Ed. 485, 488.

Comments Respecting Statement of the Case.

By reason of the numerous grossly inaccurate and misleading statements made in the petitioners' statement, we deem it necessary to comment at some length on the facts as shown by the record. In the California Superior Court the plaintiffs, Teitelbaum Furs, Inc., a California corporation, Teitelbaum Furs, Inc., a New York corporation, and Teitelbaum Furs of Palm Springs, Inc., a California corporation, sought recovery from defendant insurance carriers for an alleged theft of furs. Before the action was commenced Albert Teitelbaum, president of petitioner corporations, was convicted of staging a fake robbery and the filing of false and fraudulent insurance claims with the insurance company defendants in this action. Petitioners conceded at the trial of the action and in their briefs that the corporate plaintiffs were *alter egos* of Albert Teitelbaum. One of the defenses set up by defendants in their pleadings

and at trial was that the combination of Albert Teitelbaum's conviction with the *alter ego* status between himself and the petitioner corporations was *res judicata* and precluded recovery.

The California Supreme Court held, with abundant evidence in the record to sustain its holding in addition to the concessions made by the petitioners, that the corporations were *alter egos* of Albert Teitelbaum, that Mr. Teitelbaum's previous criminal conviction for filing false claims with defendants to obtain the proceeds of the same insurance policies sued on in this action barred the action by his corporate *alter egos*, which are petitioners here. The only point actually raised by the facts is a contention, although not stated, that application of the *alter ego* doctrine to petitioners deprived them of federal rights. Petitioners' statement of fact and statement of issues is entirely inaccurate and not in accordance with the record in that it assumes that a separate corporate entity has been precluded from recovery by the conviction of an officer. In fact, however, the application of *res judicata* was based upon proved and conceded privity of Albert Teitelbaum with the corporations which were but his *alter egos*.

Mr. Teitelbaum's conviction resulted from claims made to defendants to obtain the proceeds of the same insurance policies sued on in this action. Judgment of conviction on the indictment by the Los Angeles Grand Jury to commit grand theft, attempted grand theft and the presentation and filing of false insurance claims was sustained on appeal. (*People v. Teitelbaum*, 163 Cal. App. 2d 184, hear. den. October 24, 1958; cert. denied by the United States Supreme Court, 359 U. S. 206).

Prior to the trial of the civil action the defendants made certain "Requests for Admission" to the plaintiffs, which plaintiff-petitioners admitted by their failure to deny them. These admissions were introduced in evidence at trial, as follows:

"No. 12. 'That Albert Teitelbaum, did, acting in his capacity as president of all of the plaintiff corporations, cause to be delivered to Carl Gable a certain tentative list of property allegedly missing as a result of an alleged burglary which allegedly occurred on December 27, 1955; that said list was introduced into evidence in the case of People vs. Albert Teitelbaum, et al., case No. 178748 in the Superior Court of the State of California, in and for the County of Los Angeles, as a 'People's exhibit.'

"No. 13: 'That the indictment numbered SMC No. 178748 in the Superior Court of the State of California, in and for the County of Los Angeles, entitled the People of the State of California, Plaintiff, vs. Albert Teitelbaum, et al., Defendants, *concerned the same purported theft and the same insurance claims as are sued upon by plaintiff in this action No. 762724.*'

The Court: *672724.*

Mr. White: Thank you, your Honor. I misread it.

"14: 'That Albert Teitelbaum, the president of each of plaintiff corporations, in criminal case No. 178748 in the Superior Court of the State of California, in and for the County of Los Angeles, was convicted of conspiracy to commit grand theft, attempted grand theft, and filing of false and fraud-

ulent insurance claims in violation of Penal Code Section 182, Penal Code Section 484, and Insurance Code Section 550; *that said conviction resulted from the presentation of documents respecting a purported loss to the insurance companies which are defendants to this action No. 672724 concerning the alleged theft mentioned and sued upon by plaintiffs' amended complaint in this action No. 672724.*" (emphasis supplied). [Rep. Tr. p. 2006, line 8, to p. 2007, line 17].

It was thus established by admissions of the plaintiffs that Albert Teitelbaum's conviction concerned the same purported theft and the same insurance claims as those sued upon in this action and that the conviction resulted from the presentation of documents respecting a purported loss to the defendants. Petitioners' contentions to the contrary are unsupported by the record of the case.

In their Petition for Writ of Certiorari plaintiffs have contended that the decision of the California Supreme Court holds that "When an officer of corporations is convicted in a criminal case of a crime connected with their insurance it becomes *res judicata*". This, however, is not the holding. In fact, the court held that when a person who is not only an officer of corporations but likewise who stands in the position of *alter ego* to the corporations, then the said corporations, being mere *alter egos* of the person convicted of staging a fake robbery and filing false insurance claims, will be defeated by the operation of *res judicata* and collateral estoppel. (See Appendix B to Petition for Writ of Certiorari: Opinion of the Supreme Court of California, pp. 28, 29).

Contrary to the plaintiffs' contentions, there was no jury finding, either implicit or explicit, contrary to the ruling of the California Supreme Court that the plaintiff companies were *alter egos* of Mr. Teitelbaum. To the contrary, defendants' requested instruction No. 64, which would have presented the issue to the jury exactly in accordance with the ruling of the Supreme Court, was refused by the trial judge. This proffered but refused instruction read as follows:

"DEFENDANTS' REQUESTED INSTRUCTION NO. 64

"In the event you find that the corporate entities of the plaintiff corporations should be ignored under the 'alter ego' doctrine which I have explained to you in the other instructions, then you are to consider the prior conviction of Albert Teitelbaum as a bar to recovery by the corporate plaintiffs in this action.

"Refused

A. A. Scott, Judge"

[Rep. Tr. p. 2474, lines 14-22].

Rather than instructing the jury in accordance with the proffered instruction the trial judge instructed them at the request of the plaintiffs-petitioners:

> "You are instructed that there is a presumption that Albert Teitelbaum, an officer of plaintiff corporations, is innocent of any crime or wrong." [Rep. Tr. p. 2434, lines 13-15].

and further instructed the jury that Mr. Teitelbaum's conviction could be considered "for only one purpose, namely, in judging the credibility of that witness" [Rep.

Tr. p. 2433, lines 23-24]. It is clear, therefore, that the assertion that the jury passed upon the *alter ego* question is incorrect since it was never submitted to the jury.

Uncontradicted evidence, however, clearly showing that the plaintiff corporations were *alter egos* of Mr. Teitelbaum was presented at trial, as was set forth in Respondents' Brief and Cross-Appellants' Opening Brief, as follows:

> "The applicability to this case of decisions permitting piercing of the corporate veil was established by evidence which showed that, in effect all of the plaintiff corporations were one man operations and that fraud would result from a failure to recognize that the plaintiff corporations were the double and *alter ego* of Al Teitelbaum and the intermediary through which he transacted his business. Although Sylvia Teitelbaum, a director of the plaintiff corporations, testified at her deposition, read into the record, that the corporation never loaned any money to a Mr. Lanza and that 'any money that was loaned to Mr. Lanza was personal' [Rep. Tr. p. 1283, lines 17-22], Mr. Teitelbaum admitted that the corporation had loaned Mr. Lanza sums of money and that during the years 1954 and 1955 this amounted to $57,000 [Rep. Tr. p. 500, lines 4-14]. When payment came from Mr. Lanza on that account, Mr. Teitelbaum was not even certain that it 'went into the corporation' [Rep. Tr. p. 500, lines 15-19]. The corporation never declared a dividend [Rep. Tr. p. 604, lines 2-4]. According to the Teitelbaum bookkeeper, Brodkin, Mr. Teitel-

baum had a 'loan account', where he borrowed and paid back money; on many occasions when such loans were made Mr. Teitelbaum gave the bookkeeper instructions to write the checks and he never presented any resolution of the board of directors to such effect [Rep. Tr. p. 783, line 20, to p. 784, line 16]. Mr. Teitelbaum ordered the bookkeeper to understate excise taxes [Rep. Tr. p. 1969, lines 12-20]. On several occasions, when the bookkeeper Mrs. Bleick (Connie Fairchild) discovered that furs had been sold without records being made, Mr. Teitelbaum ordered her to make out a sales receipt for such merchandise [Rep. Tr. p. 1944, line 24, to p. 1945, line 9]. Mr. Teitelbaum also received checks to the corporation and put them in his pocket, disposed of them and later told the bookkeeper what the disposition was [Rep. Tr. p. 2182, line 22, to p. 2183, line 2]. The record is entirely devoid of any evidence that the corporations were anything but the vehicles through which Mr. Teitelbaum conducted his personal business. Prior to the incorporation in 1946 Al Teitelbaum was the sole owner of the business. Thereafter, his wife, Sylvia Teitelbaum acquired some stock interest. Al Teitelbaum and his wife were directors of the corporation and Mrs. Teitelbaum's mother, Jennie Hoffman, was likewise a director at the beginning of the incorporation. According to Mrs. Teitelbaum, her mother was a director 'a long time ago' and was not a director for 'too long a time.' After her resignation she was not replaced on the Board of Directors [Rep. Tr. p. 1282, line 19, to p. 1283, line 13]. Thus, the 'cor-

poration' did not have three directors, as required by the Corporations Code, Section 800." (Resp. Br., and Cross-App. Op. Br. pp. 122-124).

Not only did the evidence establish that in effect all of the plaintiff corporations were one-man operations and that fraud would result from a failure to recognize that the plaintiff corporations were the double and *alter ego* of Albert Teitelbaum and the intermediary through which he transacted his business, but further, that even the corporate form of business was ignored in that the "corporations" did not even pretend to act through a Board of Directors, since a board did not exist.

The plaintiffs presented no evidence at trial which would show or tend to show that the *alter ego* doctrine should not apply but, rather, to the contrary, conceded this important point in their briefs and at trial.

In their original brief to the District Court of Appeal, "Respondents' Brief and Cross-Appellants' Opening Brief", quoted from *supra*, the respondent defendants set forth at some length the evidence presented to the trial court which would require a finding that the plaintiff corporations were the double and *alter ego* of Albert Teitelbaum (see Resp. Br. and Cross-App. Op. Br. pp. 122-124). The position of the defendants was not controverted by plaintiffs at any place in their "Appellants' Reply Brief and Cross-Respondents' Brief". Quite to the contrary, it was in that document unequivocally stated at page 59:

> "If, as Defendants contend, the Plaintiff Corporations were merely *alter egos* of Mr. Teitelbaum, a legal position which we have at no time sought to refute, there can be no justified criticism

of Mr. Teitelbaum cashing or using a portion of check proceeds payable to his companies whether or not the books did, as done here, reflect the transaction."

Plaintiffs also conceded at page 103 of their "Cross-Respondents' Brief":

"No attempt has been made to hide Mr. Teitelbaum behind the skirts of his Corporations or to avoid any ill effects that would result from disregarding his Corporate entities. The insurance was issued to the Plaintiffs as Corporations and they sued as such."

At trial Mr. Kalik, representing the Teitelbaum Corporations, stated respecting Mr. Teitelbaum: "he is not hiding behind any corporation's skirts", and, "We are not saying that the corporation is different than Mr. Teitelbaum * * *" [Rep. Tr. p. 2378, lines 17-24].

In their Petition for Hearing before the California Supreme Court, the defendants stated: "The privity of Mr. Teitelbaum with the named corporate plaintiffs has been conceded by the plaintiffs in their Appellants' Reply Brief filed with the District Court of Appeal * * *" (Pet. for Hear. p. 3), and thereafter set forth the portions of said "Appellants' Reply Brief" where the concession was made. No where in the present petitioners' "Answer to Petition for Hearing" was any claim made on behalf of the Teitelbaum Corporations that no concession had been made but, to the contrary, that entire brief was based upon the assumption that "*alter ego*" had been established and, further, in that brief Mr. Kalik used the following language: "Both Mr. Teitelbaum and *his* Corporations * * *" (Answer to

Pet. for Hear. p. 28 (emphasis supplied.) As shown by the record, it was proved at trial without contradictory evidence that the corporate plaintiffs were but the *alter egos* of Mr. Teitelbaum. This important point was conceded by plaintiffs' counsel at trial and in their appellate briefs and during the pendency of the appeal in the California District Court of Appeal and Supreme Court. Counsel for petitioners at no time during the trial of the appeal contended that *alter egos* had not been proved and conceded.

Petitioners have intimated that one of the issues tried was a claim that "* * * the criminal prosecution of Teitelbaum was inspired by the insurance companies to defeat the insurance claims." In the joint pre-trial statement it was set forth by the defendants that there was no issue on this subject. A perusal of the testimony at trial shows that there was no evidence whatsoever presented in support of this claimed issue. A complete study of the briefs filed on behalf of the Teitelbaum corporations in the California District Court of Appeal and the California Supreme Court shows likewise that no such "issue" was urged to the California reviewing courts. Since the issue was never regularly presented to the California courts for their determination, it would appear to be contrary to settled rules that it should first be presented to the Supreme Court of the United States.

Plaintiffs have also endeavored to make a point of the alleged demotion of Captain Borders and the reasons therefor at page 10 of their Petition. No evidence on this subject was presented at trial. The Clerk's Transcript reference at page 10 of the Petition refers to cer-

tain newspaper clippings filed as a portion of an affidavit of Horace Kalik in his opposition to defendants' motion for new trial. These matters were ordered stricken by reason of the failure of plaintiffs to comply with California Code of Civil Procedure Section 659a and California Superior Court Rule 3, subdivision 5 [Clk. Tr. p. 150]. Parenthetically, it should be noted that the defendants' motion for new trial on the grounds that there was insufficient evidence to justify the verdict and irregularity of the proceedings of the adverse party through their attorney which prevented the defendants from having a fair trial was granted [Clk. Tr. p. 150].

Plaintiffs have further argued that the jury was denied the right to infer that Teitelbaum's conviction was "the result of perjured testimony knowingly produced by Borders, a police officer and officer of the state", and then argue that at the criminal trial Borders had "produced" one Clifford Vanderwyst. The record in this case, however, is devoid of any evidence tending to support this belated argument made here on behalf of petitioners but never raised in this action at trial or on appeal to the appellate courts of the State of California. It is noteworthy that where petitioners engage in flights of fancy of this type they studiously avoid making any citation to the record, this avoidance being because the record does not contain evidence to support their misleading allegations. Petitioners have also argued in that portion of their brief labeled "Statement" that "The Supreme Court * * * applied retrospectively the law it proclaimed." A reading of the Opinion of the California Supreme Court, however, discloses that it was not a retrospective application but rather the Cali-

fornia Supreme Court followed and applied the rule which that court had proclaimed in *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892, decided March 30, 1942 (rehearing denied April 3, 1942).

Question Presented.

At pages 21 through 25 of the "Petition for Writ of Certiorari" certain alleged issues are set forth. They are not, however, issues because the facts assumed therein are not contained in the entire record, are not true, and appear to result from unfamiliarity with the record by petitioners. Petitioners have attempted to raise a number of issues based upon an assumption of facts not contained in the entire record and based on assertions not brought to the attention of any California court until after judgment of the California Supreme Court had become final. Whereas the record clearly shows that jurisdiction does not exist and that no federal question has been raised, if it were appropriate to state a question from the actual record it would necessarily read substantially as follows: Where it has been proved and conceded and held by the highest state court that certain corporations are but the *alter egos* of their president, and the highest state court, applying state law in effect for twenty years, holds that the principle of *res judicata* precludes the corporate *alter egos* from maintaining an action wholly inconsistent with the prior final conviction of their president standing in an *alter ego* relationship to them, is there any constitutional prohibition against the state's so applying its final judgment to prevent fraud and the relitigation of decided issues by privies of the convicted person?

The California Supreme Court Followed Established Law in Holding That Mr. Teitelbaum's Conviction Was Res Judicata.

The California Supreme Court did not act retrospectively or retroactively. *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P. 2d 892, was decided March 6, 1942 and rehearing denied April 3, 1942. In that case, which was relied on and followed by the California Supreme Court in the instant matter, the California rule respecting *res judicata* and the requirements for its application was clearly set forth and several prior decisions inconsistent with it were reversed. The requisites set forth in the *Bernhard* case are, as noted by the California Supreme Court in the Teitelbaum case (App. B, p. 29), as follows:

> "'Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?'"

The California Supreme Court stated:

> "The record in the present case provides affirmative answers to each of these questions."

That the California Supreme Court intended its rule to apply to criminal as well as civil adjudications was indicated in its decision in *Bernhard*, in which case the court cited with approval *Eagle, etc., Ins. Co. v. Heller*, 149 Va. 82, 140 S. E. 314, 57 A. L. R. 490, in which case the Virginia court had held that conviction for arson precluded a later recovery against the insurance company by the convicted arsonist.

Petitioners' comment upon a refusal to apply collateral estoppel to an acquittal is inapplicable here. There is good reason, as pointed out in the court's opinion in *In re Anderson*, 107 Cal. App. 2d 670, 237 P. 2d 720, that an acquittal should not be *res judicata* in subsequent litigation. The court states:

> "* * * The acquittal was "merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused" Lewis v. Frick, 233 U. S. 291, 302, 34 S. Ct. 488, 492, 58 L. Ed. 967, [973]. It did not determine that Mitchell had not wilfully attempted to evade the tax. * * *" (237 P. 2d at p. 721).

At page 37 of the "Petition for Writ of Certiorari", petitioners have incorrectly attempted to limit the issues before the court in the civil case. The issue was not simply whether the insurance companies had breached a contract, but also whether the plaintiffs' action was barred by reason of misrepresentation and fraud as provided in the policies, whether the plaintiff corporations were the double and *alter ego* of Albert Teitelbaum, whether Albert Teitelbaum's conviction would prevent recovery by plaintiff corporations.

It is clear from the uncontradicted evidence that the issues determined by Albert Teitelbaum's conviction, which required proof beyond a reasonable doubt, were identical to the issues as to plaintiffs' action being barred by reason of dishonesty, misrepresentation and fraud.

The policy provisions [Ex. 2] respecting fraud and dishonesty pleaded by defendants as a bar to plaintiffs' recovery, are as follows:

"MISREPRESENTATION AND FRAUD.

This policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." [Clk. Tr. p. 27, lines 23-27].

* * * * *

"4. EXCLUSIONS:

"THIS POLICY DOES NOT INSURE AGAINST:

"(A) Loss, damage or expense caused by or resulting from sabotage, theft, conversion or other act or omission of a dishonest character (1) on the part of the Assured or his or their employees, or (2) on the part of any person to whom the property hereby insured may be delivered or entrusted by whomsoever for any purpose whatsoever, unless such loss arises while the goods are deposited for safe custody by the Assured, officer of the corporation, member of the firm or salesman while traveling, or while the goods are in the custody of (a) the Post Office Department as first class registered mail, or (b) a common carrier or (c) a person serving as a mere porter or helper not on the payroll of the Assured" [Clk. Tr. p. 26, lines 4-17].

* * * * *

"It is understood and agreed that the risks of infidelity or dishonesty of any person or persons to whom the said goods may be entrusted and or conversion and or consequential damage are excluded hereunder." [Clk. Tr. p. 27 lines 11-13].

The petitioners' erroneous contention that the issues were entirely different totally ignores these policy provisions and petitioners' admissions that the indictment concerned the same purported theft and insurance claims as are sued upon by plaintiffs in this action, and further ignores the binding admission that the conviction resulted from the presentation of documents respecting a purported loss to the insurance companies. [See Requests for Admission which were admitted and introduced into evidence, Rep. Tr. p. 2000, line 8, to p. 2007, line 17*].

Application of Alter Ego Doctrine and Res Judicata by United States Supreme Court

The *alter ego* doctrine has been applied by the United States Supreme Court and by various United States District Courts of Appeal. As stated by Mr. Justice Clarke for the Court in *Chicago, Milwaukee & St. Paul*

*California Code of Civil Procedure, Section 2033, provides, in part: "Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed files and serves upon the party requesting the admission either (a) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time."

Railway Company v. Minneapolis Civic & Commerce Association, 247 U. S. 490, 501, 38 S. Ct. 553, 62 L. Ed. 1229, 1237:

> "While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. United States v. Lehigh Valley R. Co. 220 U. S. 257, 273, 55 L. Ed. 458, 463, 31 Sup. Ct. Rep. 387, and United States v. Delaware, L. & W. R. Co., 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

See, also:

Davis v. Alexander, 269 U. S. 114, 117, 46 S. Ct. 34, 70 L. Ed. 186;

Hollander v. Henry, 186 F. 2d 582 (U. S. C. A., Second).

The United States Supreme Court denied certiorari in the case of *Connecticut Fire Insurance Co. v. Ferrara*, 277 F. 2d 388 (rehearing denied), certiorari de-

nied, 364 U. S. 903, 5 L. Ed. 2d 195, 81 S. Ct. 231, where the United States Court of Appeals for the Eighth Circuit had held that an insured's conviction for arson precluded his recovery in a civil suit brought against his insurance companies.

Conclusion.

Defendants and respondents respectfully urge that petitioners, having failed to submit any federal question to the trial court or during the regular process of appeal in the California District Court of Appeal and Supreme Court, have failed to follow the procedure for certiorari required by this Honorable Court's rules and decisions. The refusal of the California Supreme Court to grant the belated Motion to Recall Remittitur did not involve a decision against a right under the Constitution of the United States but, to the contrary, was based upon adequate state grounds. The facts of the case, as distinguished from assertions erroneously made in the "Petition for Writ of Certiorari", disclose that the California Supreme Court acted correctly under rules long recognized in California and by the United States Supreme Court in precluding a retrial of issues finally determined by dealing with the substance of the transaction involved and ignoring the fiction of corporate agency by reason of abundant evidence and concessions made by petitioners' counsel.

Respectfully submitted,

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